No. 13096

United States
Court of Appeals
For the Ninth Circuit

EUGENE B. SMITH & CO., Inc., a corporation,

Appellant,

vs.

ELOY GIN CORPORATION, a corporation, and HOME INSURANCE COMPANY, a corporation,

Appellees.

Appellant's Opening Brief

FENNEMORE, CRAIG, ALLEN & BLEDSOE
404 Phoenix National Bank Building
Phoenix, Arizona

Attorneys for Appellant

THOMPSON, KNIGHT, WRIGHT,
WEISBERG & SIMMONS
Republic Bank Building
Dallas 1, Texas

OF COUNSEL

FILED

DEC 21 1951

SUBJECT INDEX

TABLE OF CASES AND AUTHORITIES CITED

SUBJECT INDEX

TABLE OF CASES AND AUTHORITIES CITED

United States
Court of Appeals
For the Ninth Circuit

EUGENE B. SMITH & CO., Inc., a corporation, Appellant, vs. ELOY GIN CORPORATION, a corporation, and HOME INSURANCE COMPANY, a corporation, Appellees.	No. 13096

Appellant's Opening Brief

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

Eugene B. Smith and Co., Inc., a corporation, plaintiff below, hereinafter referred to as "Smith Corporation" is a corporation organized under the laws of the State of Texas. Defendant Eloy Gin Corporation, a corporation, hereinafter referred to as "Eloy" is a corporation organized and existing under the laws of the State of Arizona. Defendant Home Insurance Company, a corporation, is a corporation organized and existing under the laws of the State of New York. (T. R. 34, 35, 69)

The amount in controversy is in excess of three thousand dollars ($3,000.00). (T. R. 36, 38, 69)

The District Court had jurisdiction under the provisions of Title 28, U.S.C.A., Section 1332, page 257. Judgment adverse to appellant Smith Corporation was rendered by the United States District Court for the District of Arizona (T. R. 54) and this Court has jurisdiction upon this appeal to review the said judgment under the provisions of Title 28, U. S. C. A., Section 1291, page 230.

STATEMENT OF THE CASE

On November 7, 1945, Eloy as seller and Eugene B. Smith, hereinafter called "Smith", an individual doing business as Eugene B. Smith and Co., as buyer entered into two written contracts by which Smith agreed to buy and Eloy to sell a total of thirteen hundred (1300) bales of cotton, upon the terms set forth in said contracts. (T. R. 74) Each of said written contracts contained the following provision:

> "INSURANCE at sellers risk until payment completed.
>
> REIMBURSEMENT Sight Draft, gin-yard receipts attached, also Smith/Doxey cards, Draw on Eugene B. Smith & Co., care Valley National Bank, Phoenix." (T. R. 70)

Each of said contracts was completed in full accordance with its terms. As cotton was ginned and baled, the bales were marked and gin yard receipts issued for each bale, the gin yard receipts being issued by Eloy to Eloy and thereafter, sight drafts were drawn on Smith care Valley National Bank, Phoenix. The gin yard receipts were endorsed in blank by Eloy, attached to the sight drafts and as the drafts were

paid, the gin yard receipts were delivered by the Valley National Bank to Smith. The bales of cotton remained in the possession of Eloy until removed from its possession by surrender of the gin yard receipts and delivery of the cotton to the one presenting the receipts. All of said cotton was paid for in accordance with the terms of said agreements and all delivered and the gin yard receipts surrendered with the exception of forty (40) bales.

On January 25, 1946, a fire occurred at the gin yard of Eloy and of the forty (40) bales of cotton for which Smith had gin yard receipts and on which delivery had not been taken and the receipts surrendered, thirty-nine (39) were destroyed in the fire. (T. R. 70-71)

Each of the gin yard receipts so held by Smith contained the following provision:

> "THIRD: That said bale of cotton has been insured, while stored as aforesaid under this receipt against direct loss and/or damage by fire except as limited and provided in insurance policy covering same".

On August 1, 1945, Eloy had secured a policy of insurance from The Home Insurance Company (T. R. 79) covering

> "merchandise held in trust * * * * or left for storage * * * * but loss shall be adjusted with and payable to the insured" (Eloy)

and which also provided that

> "This policy insures Eloy Gin Corporation. Loss, if

any to be adjusted with the insured named herein and payable to insured." (T. R. 83)

which policy was in full force and effect on the date of the fire, January 25, 1946. (T. R. 72)

As of August 1, 1944, Smith effected a policy of fire insurance with National Fire Insurance Company of Hartford, Connecticut (T.R. 104) covering, except as otherwise provided in the policy,

"The risks of loss or damage to all cotton in bales * * * * while owned by the assured * * * * by fire * * * *" (T.R. 92)

Said policy further provided:

"This policy does not cover the following * * * *
(c) Cotton for which the Assured is liable as warehouseman or other bailee, or for which the Assured is liable to any person, firm or corporation. This insurance shall never inure to the benefit of any carrier, bailee or any person, firm or corporation other than the Assured, except that payments may be made as provided for in Section 9 above.

(d) Cotton for which any carrier or other bailee is liable, or cotton under bills of lading or storage receipts that give the carrier, warehouseman or other bailee the benefit of any insurance thereon, or cotton on which any carrier or other bailee has insurance which would attach if this policy had not been issued, or insurance which would, under any circumstances, inure to the benefit of the Assured hereunder." (T. R. 98)

Said policy further provided in paragraph 8 of the provisions relating to payments or advances in case of loss that:

> "After presentation of proofs of loss or damage to cotton described in Section 1 of this form (and not excluded hereunder) while in possession of any carrier or other bailee, this Company, provided the provisions of this policy have been complied with, will advance as a loan to the Assured the amount of such loss or damage, repayable only to the extent of any recovery from such carrier or bailee."

Said policy was on the date of the fire, January 25, 1946, in full force and effect. (T.R. 72)

After the fire Eloy failed to make any proof of loss to The Home Insurance Company covering the thirty-nine (39) bales of cotton, relying upon the advice of the adjuster representing The Home Insurance Company in adjusting the loss that the cotton was not covered by the policy. (T.R. 140)

After the cotton was destroyed by fire, National Fire Insurance Company advanced to Smith the sum of four thousand eight hundred sixty-seven and 43/100 dollars ($4,867.43) by its loan draft, which stated that said

> "sum is advanced as a loan repayable only to the extent of any net collection we may make from any carrier, bailee or others on account of loss to forty (40) bales of cotton due to fire at Eloy, Arizona on or about January 25, 1946". (T.R. 72, 120)

and in consideration of said advance Smith executed under date of February 18, 1946, a receipt which contained the following provision:

> "Received from National Fire Insurance Co. the sum of Four Thousand Eight Hundred Sixty-Seven and 43/100 Dollars as a loan and repayable only to the extent of any net recovery we may make from any carrier, bailee, or others, on account of loss or damage to cotton in bales, our property, due to fire at Eloy, Arizona, on or about the 25th day of January, 1946, or from any insurance effected by any carrier, or bailee, or others, on said property." (T. R. 122)

Thereafter, as of July 1, 1946, Smith transferred his cotton business to appellant, which took over the assets, liabilities and contracts of Smith in connection with his cotton business. (T. R. 172-173)

Thereafter, appellant brought this action for the recovery of the value of the cotton destroyed in the fire. During the trial the plaintiff offered to show the custom of the trade with respect to payment of insurance charges after the first twenty (20) days (T. R. 133-134) the gin receipts (T. R. 77) being silent as to this, but the Court refused to admit the testimony upon defendants' objection. After adverse judgment (T. R. 54) and denial of motion for new trial (T. R. 57) appellant gave notice of appeal to this Court (T. R. 58), filed its appeal bond (T. R. 58) and thus the case comes before this Court on appeal.

The Court below entered its judgment (T. R. 54) based upon Findings of Fact and Conclusions of Law

which denied appellant recovery against Eloy upon two grounds:

First, that Smith suffered no loss in that he was reimbursed and indemnified by loan receipts by National Fire Insurance Company (Finding IV T. R. 51).

Second, that by his contracts of purchase with Eloy covering cotton hereinvolved, together with other cotton, he had relieved Eloy from liability for cotton paid for in the event of fire (Finding IV, V, T. R. 51 and Conclusion of Law (5) T. R. 53-54).

SPECIFICATIONS OF ERROR

POINT I

The Court below was in error in finding that Smith suffered no loss as he was reimbursed in that payment under the loan receipt reimbursed and indemnified him.

POINT II

The Court below was in error in holding that by his contracts of purchase with Eloy covering the cotton hereinvolved, he had relieved Eloy from liability for cotton paid for in the event of fire.

POINT III

The evidence being uncontradicted, the Court below was in error in not finding that by the delivery of warehouse receipts covering the cotton in question, Eloy became a warehouseman as to Smith and by the terms of the warehouse receipts was obligated to in-

sure the cotton and was therefore liable to appellant either because the insurance which Eloy obtained did not cover the cotton, or if it did cover the cotton, then because of its failure to make the necessary steps to collect the insurance.

POINT IV

The Court below was in error in refusing to admit testimony as to the custom of the trade with respect to billing for insurance charges after the first twenty (20) days.

ARGUMENT

POINT I

The Court was in error in finding that the payment to appellant by National Fire Insurance Company was reimbursement and indemnification which would prevent the maintenance of an action against Eloy. The payment was admittedly made under a loan receipt as a loan to be repaid only to the extent of recovery from any bailee or others on account of the loss by fire. The leading case establishing the right to maintain an action against the bailee or others where payment is made by an insurer under such an agreement is *Luckenbach vs. W. J. McCahan Sugar Refining Company*, 248 U.S. 139, 39 Supreme Court 53. In that case a shipment had been lost at sea while on a common carrier under a bill of lading providing that the carrier should, to the extent of its liability, have the full benefit of any insurance that may have been effected on the goods. Shipper had full insurance under a policy which, however, provided that the assured warranted the insurer free from any liability for merchandise in

the possession of a carrier liable for any loss or damage thereto and for merchandise shipped under a bill of lading containing a stipulation that the carrier might have the benefit of any insurance thereon. Notwithstanding this provision, the insurance company advanced the shipper the amount of the loss under a loan agreement in substance the same as the one involved here and the shipper thereupon brought suit against the carrier. The Supreme Court, in holding the shipper was not barred from maintaining the action, cites as follows:

> "Upon delivery of this and similar agreements, the shipper received from the insurance companies, promptly after the adjustment of the loss, amounts aggregating * * * * the loss; and this libel was filed in the name of the shipper, but for the sole benefit of the insurers, through their proctors and counsel, and wholly at their expense. If, and to the extent (less expenses) that, recovery is had, the insurers will receive payment or be reimbursed for their so-called loans to the shipper. If nothing is recovered from the carrier, the shipper will retain the money received by it without being under obligation to make any repayment of the amounts advanced. In other words, if there is no recovery here, the amounts advanced will operate as absolute payment under the policies.
>
> Agreements of this nature have been a common practice in business for many years. *Pennsylvania Railroad Co. vs. Burr*, 130 Fed. 847, 65 C.C.A. 331; *Bradley vs. Lehigh Valley Railroad Co.*, 153 Fed. 350, 82 C.C.A. 426. It is clear that if valid and enforced according to their terms, they accomplish

the desired purpose. They supply the shipper promptly with money to the full extent of the indemnity or compensation to which he is entitled on account of the loss; and they preserve to the insurers the claim against the carrier to which by the general law of insurance, independently of special agreement, they would become subrogated upon payment by them of the loss. The carrier insists that the transaction, while in terms a loan, is in substance a payment of insurance; that to treat it as if it were a loan, is to follow the letter of the agreement and to disregard the actual facts; and that to give it effect as a loan is to sanction fiction and subterfuge. But no good reason appears either for questioning its legality or for denying its effect. The shipper is under no obligation to the carrier to take out insurance on the cargo; and the freight rate is the same whether he does or does not insure. The general law does not give the carrier, upon payment of the shipper's claim, a right by subrogation against the insurers. The insurer has, on the other hand, by the general law, a right of subrogation against the carrier. Such claims, like tangible * * * salvage, are elements which enter into the calculations of actuaries in fixing insurance rates; and, at least in the mutual companies, the insured gets some benefit from amounts realized therefrom. It is essential to the performance of the insurer's service, that the insured be promptly put in funds, so that his business may be continued without embarrassment. Unless this is provided for, credits which are commonly issued against drafts or notes with bills of lading attached, would not be granted. Whether the transfer of money or other thing shall operate as a payment, is ordinarily a matter which is determined by the intention of the

parties to the transaction. Compare The Kimball, 3 Wall. 37 44, 18 L. Ed. 50. The insurer could not have been obliged to pay until the condition of their liability—i. e., nonliability of the carrier—had been established. The shipper could not have been obliged to surrender to the insurers the conduct of the litigation against the carrier, until the insurers had been paid. In consideration of securing then the right to conduct the litigation, the insurers made the advances. It is creditable to the ingenuity of business men that an arrangement should have been devised which is consonant both with the needs of commerce and the demands of justice."

To the same effect is *Dixey vs. Federal Compress and Warehouse Company* (C.C.A. 8) 132 Fed. (2) 275.

We submit that the Court below was clearly in error on the authority of these cases in holding that payment by the National Fire Insurance Company under the loan agreement was in anywise a bar to an action by appellant against Eloy.

POINT II

The Court below was in error in holding that Smith by his contracts of purchase assumed liability for the destruction of the cotton by fire after payment therefor. The purchase contracts (T. R. 74) provide

> "INSURANCE at seller's risk until payment completed"

but contain no provision with respect to insurance after payment is completed.

Had there been no further contracts between the parties the conclusions reached by the Court below might be justified by implication, or by the rule that in the absence of anything to the contrary, buyer stands risk or loss after passage of title, but the contracts (T. R. 74) also provide for

> "REIMBURSEMENT Sight Draft, *gin-yard receipts attached*" (Emphasis supplied)

At the time of the fire Smith had paid for the cotton involved here and held the receipts therefor. (T.R. 71-72). These receipts (T. R. 77-78) were negotiable warehouse receipts, each covering one (1) bale of cotton, which was deliverable by the terms thereof to Eloy or order and were endorsed in blank by Eloy and delivered to Smith. (T. R. 70-71)

Section 52-831, Arizona Code of 1939, provides in part:

> "A negotiable receipt may be negotiated by delivery; * * * * whereby the terms of the receipt the warehousman undertakes to deliver the goods to the order of a specified person and such person * * * * has endorsed it (the receipt) in blank".

Section 52-834, Arizona Code of 1939, provides in part:

> "A person to whom a negotiable receipt has been duly negotiated acquires thereby * * * * the direct obligation of the warehouseman to hold possession of the goods for him *according to the terms of the receipt* as fully as if the warehouseman had con-

tracted directly with him". (Emphasis supplied) The delivery of the gin receipts to Smith constitute therefore, negotiation to him and thereby he acquired the obligation of Eloy to hold the cotton for him *according to the terms of the receipt*, as fully as if Eloy had contracted directly with him.

The purchase contract (T. R. 74) was executed in November and the gin receipts (T. R. 77-78) were executed in December following. Even if the purchase contracts (T. R. 74) should have contained an express provision, which they did not, that insurance was at buyer's risk after payment completed, the later contracts evidenced by the negotiated gin receipts would have been controlling.

First Mortgage Bond Homestead Ass'n. vs. Nelson, 151 Md. 181, 135 A. 139, in which case the Court cites and applies the general rule as follows:

> "Where there are several contracts in the same matter of different dates or when one is plainly intended to supersede the other, the latter will control. So if there is a plain repugnancy between the provisions of an original contract and those of a supplemental one between the same parties and relating to the same subject-matter, the earlier contract must yield to the later as far as the repugnancy extends. 13 C. J. 529".

POINT III

On the uncontradicted evidence the Court below should have found that by the delivery of warehouse receipts covering the cotton in question, Eloy became a warehouseman as to Smith and by the terms of the

warehouse receipts was obligated to insure the cotton and was therefore, liable to appellant either because the insurance which it obtained did not cover the cotton, or if it did cover the cotton, then because of its failure to take the necessary steps to collect the insurance.

We therefore, submit that Smith is entitled to the contractural obligation of Eloy to insure the cotton contained in paragraph THIRD of the gin receipts. (T. R. 77-78)

Under the facts of this case Eloy, having contracted with Smith to insure the stored cotton, is liable for the loss whether it did or did not in fact secure the insurance thereon. If it did not secure the insurance covering the cotton, it is liable for breach of the contract contained in the warehouse receipts. The rule is thus stated in 67 C. J. 512, paragraph 116:

> "A warehouseman's contract to procure fire insurance covering stored goods is enforceable, and he will be held liable for damages flowing from its breach, and the fact that the warehouseman was guilty of no negligence with respect to the fire damage will not exonerate him from liability for the burning of uninsured goods * * *"

In the case of *Gay vs. Davidson*, 216 Ky 424 287 S. W. 931, the Court, speaking with reference to a contract to insure by a warehouseman, states the rule to be:

> "It is well settled that a contract of this character is enforceable and where such contract exists, if no

insurance is taken out by the warehouseman and the property stored is destroyed by fire, the builder (bailor?) may have an action for its value."

To the same effect,

Rochelle Gin and Cotton Co. vs. Fisher 13 Ga. App. 621, 79 S. E. 584

Farmers Ginnery and Manufacturing Co. vs. Thrashers 144 Ga. 598, 87 S. E. 804

Keller vs. Smith 59 Minn. 203, 60 N. W. 1102

On the other hand, if the Home Insurance policy did cover the cotton hereinvolved, then Eloy is liable for the loss because of its admitted failure to take steps to collect the insurance.

In the case of *Farney vs. Hauser*, 109 Kans. 75, 198 Pac. 178, the Court states the rule in the following language at page 181:

"Defendants' final contention is that they should not be charged with their failure to collect insurance on plaintiff's wheat. They do not appear to question the general rule that where a warehouseman takes out a policy of insurance to protect his own interest in property and that held in trust by him, or concerning which he may have a liability, it is his duty to claim and collect such insurance not only for a fire loss on his own property but also for the loss sustained by the owner of the property intrusted or bailed to him. Such, of course, is the general rule. *Home Ins. Co. vs. Baltimore Warehouse Co.* 93 U. S. 527, 23 L. Ed 868 and Rose's notes thereto at page

442 et seq. And it is also settled that the failure of the warehouseman to collect such insurance renders him personally liable therefor to his customer or bailee. *Southern Cold Storage, etc. Co. v. A. F. Dechman & Co.* (Tex. Civ. App. 1903) 73 S. W. 545; *Johnston vs. Charles Abresch Co.* 123 Wis. 130, 101 N.W. 395, 68 L. R. A. 934, 107 Am. St. Rep. 995, See also 27 R. C. L. 955-958".

Similarly, in 67 C. J. 514, paragraph 118, the rule is stated as follows:

"A warehouseman insuring stored goods which are subsequently burned is under a duty to make the necessary claim and proof of loss to the insurance company, and is liable to the depositor for failure to collect insurance due to default of the warehouseman, and, where a warehouseman takes out insurance sufficient to cover both its interest and that of the depositor, and unnecessarily settles for less, it will be responsible to the depositor."

POINT IV

Testimony as to the custom of the trade with respect to billing for insurance charges should have been admitted. The proffered testimony would have shown that it was the custom to bill for insurance charges after the first twenty (20) days at the warehouseman's convenience, and to the extent that defendants may claim either lack or failure of consideration for the agreement to insure the proffered testimony should have been admitted.

Jones vs. Chaffin 102 Ala. 382, 15 S. 143

Planters' Gin and Warehouse Company vs. Pitts Banking Co. 24 Ga. App. 731, 102 S. E. 183

We therefore submit that it is immaterial whether the Home Insurance policy covered this cotton or not. In either case, Eloy Gin Corporation would be liable for the loss.

Respectfully submitted,

FENNEMORE, CRAIG, ALLEN & BLEDSOE

By RICHARD FENNEMORE
404 Phoenix Natonal Bank Building
Phoenix, Arizona

THOMPSON, KNIGHT, WRIGHT,
WEISBERG & SIMMONS

Attorneys at Law
Republic Bank Building
Dallas 1, Texas
OF COUNSEL

Planters' Gin and Warehouse Company vs. Pitts Banking Co. 24 Ga. App. 731, 102 S. E. 183

We therefore submit that it is immaterial whether the Home Insurance policy covered this cotton or not. In either case, Eloy Gin Corporation would be liable for the loss.

Respectfully submitted,

FENNEMORE, CRAIG, ALLEN & BLEDSOE

By RICHARD FENNEMORE
404 Phoenix Natonal Bank Building
Phoenix, Arizona

THOMPSON, KNIGHT, WRIGHT,
WEISBERG & SIMMONS

Attorneys at Law
Republic Bank Building
Dallas 1, Texas
OF COUNSEL